XI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(30)

आदेश पत्रक

मामला क्रमांक Cr.A-No. 464/04 सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

SB: HON'BLE SHRI DHIRENDRA MISHRA, J.

APPELLANT — Sushil Kumar Mishra, son of Nageshwar Mishra, aged 25 years, Occupation Contractor, r/o Takiya Road, Ambikapur, P.S. Ambikapur Kotwali, Distt. Surguja (C.G.)

Vs.

RESPONDENT — The State of Chhattisgarh, through S.H.O. Ambikapur, Distt. Surguja (C.G.)

16.08.2007

Shri Jitendra Shrivastava, Advocate for the appellant.

Shri Arun Sao, Addl. Public Prosecutor for the State.

2. This criminal appeal is directed against the judgment of conviction and order of sentence dated 29-4-2004 passed by the 1st Additional Sessions Judge, Ambikapur in S.T. No. 291/2002 whereby the appellant has been convicted under Sections 323 read with Section 34, 506B, 366, 342 read with Section 34 and 376(2)(g) of I.P.C. and sentenced to undergo R.I. for 1 year with fine of Rs. 1000/-, R.I. for 6 moths with fine of Rs. 1000/-, R.I. for 5 years with fine of Rs. 1000/-, R.I. for one year with fine of Rs. 1000/- and R.I. for 10 years with fine of Rs. 5000/- respectively with usual default clauses. All the sentences are directed to run concurrently.

3. The case of the prosecution, in brief, is that on 24-2-2002 at about 10 P.M., the prosecutrix had gone to the house of her Bhabhi

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Shanti Devi. As it was late in the evening, she asked the prosecutrix to stay for dinner and while they were talking in the verandah, around 10 p.m. accused Sushil along with his friend Santosh knocked the door. They entered in the house. Sushil was holding club. Both of them took the prosecutrix on the pretext of some work and thereafter asked her to sit on the motorcycle and on her refusal, she was forcibly made to sit on the motorcycle and thereafter they took her to the house of Sushil near Ramanujganj Naka and Sushil confined her in his room and forcibly raped her. On her objection, he assaulted her by club and fists on her back, hand and leg. Santosh also threatened her not to lodge report. On the next day of the incident, the prosecutrix along with her mother Phulmati went to police station, Ambikapur where report of Ex. P-3 was registered. The prosecutrix was sent for medical examination where Dr. Pratibha Rajul Jain (P.W. 5) examined her and gave report of Ex. P-2. After completing the investigation, charge sheet was filed against the appellant.

4. During trial, in all 8 witnesses were examined by the prosecution and the learned trial Court relying upon the statement of the prosecutrix and other witnesses namely mother of the prosecutrix Phulmati (P.W. 2), Sunita (P.W. 3) and Shanti Devi (P.W. 4) and Dr. Pratibha Rajul Jain (P.W. 5) has convicted the appellant and sentenced him as mentioned above.

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित 3	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

5. Learned counsel for the appellant contended that from perusal of the statement of the prosecutrix and F.I.R. of Ex. P-1, there is apparent material discrepancy between the version given by her in her Court statement and F.I.R. Before the Court she has claimed that she was taken to Ramanujganj Octroi, beind and Ramanujganj Octroy, there is a society where rice is distributed. In the F.I.R., the place of incident has been mentioned as the house of the accused. The allegation is that the prosecutrix was abducted from a place where number of inhabitants reside in the nearby, however no alarm was raised by the prosecutrix at the time of incident. This reflects that the prosecutrix was a consenting party. The prosecutrix was a consenting party is also established from the fact that she was taken as a pillion rider on motorcycle, however she did not make any attempt to flee on way and she did not raise alarm on way. The appellant has been convicted under Section 376(2)(g) of the I.P.C. for committing gang rape, however there is no evidence available on record to show that the prosecutrix was abducted by more than one person with an intention to commit rape with the prosecutrix and, therefore, the offence of gang rape is not made out.

6. On the other hand, learned counsel for the State contended that the version of the prosecutrix (P.W.1) is duly corroborated by the statement of mother Phulmati (P.W. 2) as also from the statement of Bhabhi Shantidevi (P.W. 4) from whose house the prosecutrix was

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taken by the accused and Sunita (P.W. 3) who was present in the house of Shantidevi at that time. Version of the prosecutrix is further corroborated by the statement of Dr. Prtibha Rajul Jain (P.W. 5) who found injuries over the left leg of size of 4 x 2 x 1 cm.

7. I have heard learned counsel for the parties. I have perused the record of the trial Court as also the impugned judgment.

8. The prosecutrix (P.W. 1) has stated that on the date of incident, she had gone to the house of her Bhabhi Shantidevi. While they were taking their meals, the accused came there. He was holding lathi and he caught hold of her hand and forcibly dragged her upto motorcycle. He asked her to accompany him and on refusal, he forcibly made her to sit on the motorcycle and took her to Society situated behind Ramanujganj Octroi. He started assaulting her and when she tried to flee from there, the accused assaulted her by lathi on her leg, thereafter he took out petrol and spread on her body and confined her inside the room. Thereafter he came after taking liquor from outside and forcibly raped her. Through out the night she was weeping. In the next morning at about 8.30 a.m. he said that now she can go, then she said how she will go as he has broken her leg. After some time, mother came there and took her on a rickshaw and thereafter the report of Ex. P-1 was lodged. She was examined by Dr. Pratibha Rajul Jain (P.W. 5) in the Government hospital. The statement of this witness is corroborated by the statement of

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Phulmati (P.W. 2), Sunita (P.W. 3) who was present in the house of Shantidevi from whose house the prosecutrix was taken by the accused forcibly and her Bhabhi Shantidevi (P.W. 4). P.W. 2 Phulmati has stated that the prosecutrix had gone to the house of her Bhabhi Shantidevi at 6 P.M. She did not return in the night. On the next day at about 8 a.m. accused Sushil called her and asked her to take her daughter, he has beaten her. At that time also, the accused was in drunken condition. The prosecutrix has narrated that the accused had beaten her and raped her in the night. The incident occurred in the society. The defence in the cross-examination of the prosecutrix has tried to impeach the character of the prosecutrix and her mother by suggesting that she is accustomed of taking liquor and they are engaged in trading of illicit liquor and they had implicated the accused in the said offence to extract money from him who is contractor by profession. It has also been suggested that the prosecutrix was a consenting party as she did not raise any alarm at the time of incident, however the witnesses have stuck to their claim and they remained unshaken. The version of the prosecutrix is further corroborated by the statement of Dr. Pratibha Rajul Jain (P.W. 5) who has examined her immediately after the incident and who has found two injuries on her left leg. She has stated that because of the injuries, there was swelling on her left leg and she was complaining pain and movement of left leg was restricted because of that. After seeing the injuries, she had recommended X-ray

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examination of her left leg, however, X-ray report has not been exhibited. Taking into overall evidence available on record, particularly the manner in which the offence is alleged to have been committed by the appellant, I am of the considered opinion that the defence of the appellant that the prosecutrix was consenting party cannot be accepted. The prosecution has established the involvement of the appellant in the crime in question.

9. From the evidence available on record, it is evident that when the prosecutrix was abducted from the house of Shantidevi under the threat of life, the accused was accompanied by co-accused Santosh, who helped him in forcibly taking the prosecutrix to his home and all the three persons went in the motorcycle and co-accused also helped the accused in confining her in a room.

10. Thus, there is sufficient evidence available on record for convicting and sentencing the appellant for the offence under Section 323 read with Section 34, 506B, 366 and 342 read with Section 34 of I.P.C. However there is no evidence adduced by the prosecution to establish that the co-accused Santosh while assisting the accused in commission of the offence of rape with the prosecutrix also shared the common intention to commit rape as there is no evidence against the co-accused that before the incident of abduction, during abduction or subsequent thereto, at any point of time, he had common intention to commit rape with the prosecutrix. In these

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circumstances, the submission of the learned counsel for the appellant that the appellant cannot be convicted for commission of offence punishable under Section 376(2)(g) of I.P.C. has to be accepted.

11. In the result, the appeal preferred by the appellant is partly allowed. While maintaining the conviction of the appellant under Sections 323 read with Section 34, 506B, 366 and 342 read with Section 34 of I.P.C. and the sentences imposed under those sections, appellant's conviction under Section 376(2)(g) of I.P.C. is altered to Section 376(1) of I.P.C. and the appellant is sentenced to undergo R.I. for 7 years with a fine of Rs. 5000/-, in default of payment of fine, to further undergo R.I. for one years. All the sentences shall run concurrently.

Sd/-
DHIRENDRA MISHRA
Judge

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